RASMOS PASIPANODYA
versus
OLD MUTUAL LIFE ASSURANCE COMPANY ZIMBABWE LIMITED
and
ZIMBABWE PLATINUM MINES
and
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 17 September, 26 and 27 October and 3 November 2021

Opposed Application

T Biti, for the applicant
F Mahere, for the 1st respondent
D Peneti with *K Maguchu*, for the 2nd respondent
O Zvedi, for the 3rd respondent

CHIRAWU-MUGOMBA J: The applicant presented before the court what seems to be a very straight forward matter but as the saying goes, things are not always as they seem.

The applicant's case is as follows. Whilst in the employ of the second respondent he was diagnosed with pneumoconiosis and as a result, his employment was terminated on the 25 April 2019.

During the course of his employment with the second respondent, applicant was a member under the Zimbabwe Platinum Mines Junior Staff GNA pension's scheme that was entered into between the first and second respondents. Applicant although a beneficiary was never privy to this contract. At all material times, the contributions by the second respondent to the scheme underwritten by the first respondent were in United States dollars (US$) and financed by the second respondent.

Upon termination of his employment due to ill-health, the applicant was entitled to be paid an amount equivalent to two years of his salary and this amounted to US$22 944.00. The first respondent upon being notified of the termination and purportedly in fulfilment of its obligation, paid RTGS$22 944.00 through the second respondent.

The changes brought to the law through S.I. 33/2019 and subsequently incorporated into the Finance Act, No. 2 of 2019 do not affect the applicant. Technically the applicant's employment was terminated upon his diagnosis in October 2018. The second respondent had

a duty to ensure that applicant was paid before the currency changes. It was negligent in advising the first respondent of the termination well after the currency changes. The second respondent due to its negligence is therefore liable to pay US$22 944.

In the event that the first respondent pleads privity of contract, then the second respondent must be found liable.

Alternatively, if both the first and second respondents plead that the applicant should be paid in local currency as a result of the operation of the law, then s 22(1)(d) of the Finance Act of 2019 (Act. No. 7 of 2019) must be declared unconstitutional because it constitutes unlawful deprivation of property in breach of s 71 of the Constitution. It is in any event a breach of the right to equal protection and benefit of the law – s 56 (1) of the Constitution.

Applicant has a direct interest in the matter thus clothing him with the necessary *locus standi*. He brings the application in his individual right as a person affected in terms of s 85 (1) (a) of the Constitution.

Accordingly, applicant seeks the following order:-

a. Judgment in favour of the applicant against the first respondent in the sum of US$22 944.00 or its equivalent in local currency calculated at the official exchange rate.
b. Interest at the legal rate on the above amount with effect from the date of judgment

Or alternatively

c. Judgment against the second respondent in the sum of US$22 944.00

Or alternatively

d. An order that s 23 of the Finance Act [*Chapter ……*] *(sic)* be and is hereby declared unconstitutional.
e. Judgment against the first and second respondents in the sum of US$22 944 jointly and severally each paying the other.
f. The respondents must pay costs of suit.

The first respondent raises points in *limine* as follows:

a. The contract was between the first and second respondents as a group life assurance scheme.
b. There was no contractual arrangement between applicant and the first respondent.
c. In the event of wrong doing, it is only the second respondent that would have right of recourse against the first respondent.

On the merits, that in the event that the court finds that the first respondent is liable on account of the unconstitutionality of certain provisions of the Finance Act no. 2, then the court should find that it is fully indemnified by the third respondent to the extent that any judgment entered in favour of the applicant be entered against the third respondent.

Contributions were made by the second respondent in the surrogate currency which was denominated as being at par in value to the United States Dollar.

The first respondent came to know about the applicant's retirement on the 20th of May 2019 and by that date, S.I. 33/2019 particularly s 4(1)(d) had come into existence as subsequently incorporated into the Finance Act No. 2 of 2019. The contractual obligations incurred before the effective date are values deemed to be at the rate of one: one with the US$. The applicant's contention that he is entitled to US$22 944 is erroneous. The first respondent discharged its obligations in full.

The second respondent also opposes the application and contends as follows. The scheme in question was set up to benefit second respondent's junior employees of which the applicant used to be one. This included a benefit for a medical disorder that affects the life of a beneficiary to the extent that it permanently incapacitates an employee. The premiums were paid exclusively by the second respondent in the lawful currency of Zimbabwe at any given time.

The second respondent religiously paid the premiums in US$ until the promulgation of S.I. 33/2019 meaning the contributions were at the rate of 1:1 with the RTGS dollar. The applicant was diagnosed with a medical contribution in April 2019 that rendered him unable to work. The second respondent duly paid the claim in the sum of RTGS $22 944 since this was the currency at the material time.

Whilst there were some unintended administrative lapses on the part of the second respondent, the money was subsequently paid.

The applicant is not privy to the contract between the first and second respondents and does not have no *locus standi.* The agreement is one for the benefit of a third party and thus the applicant has not pleaded the material averments for such a claim.

Just as the first respondent, the second respondent sought indemnity against the third respondent should the court find that it is liable to pay US$22 944.

The third respondent opposes the application and contends as follows. S.I. 33/2019 is a product of cabinet's responsibility of developing and implementing national policies as per s 110 (3) of the Constitution. The Finance Act, No. 2 of 2019 is constitutional. The applicant's invitation to set it aside means that he wants the court to substitute its own policy in place of that of the executive. This constitutes a breach of the doctrine of separation of powers.

Applicant has not shown that he continued to be paid in US$ post the RBZ Exchange Control Directive No. R120/18 which ordered the separation of FCA Nostro and RTGS FCA accounts until the termination of his employment on 25 April 2019.

In my view the issues that arise are as follow:

a. Are the first and second respondents liable to pay US$ 22944 to the applicant?
b. If so, should the first and second respondents be indemnified by the third respondent?
c. Is section 22(1) (D) of the Finance Act, no. 2 of 2019 unconstitutional?

In my view, the points in *limine* raised by the first respondent deal with the merits of the matter. The applicant by virtue of being a junior employee of the second respondent is entitled to the medical benefits upon losing employment due to ill-health. He cannot therefore be said to be non-suited.

The critical element is when did the liability on the part of the 1st respondent that triggered or should have triggered payment arise? That is, when did the ill-health benefit cover arise? On p 1 of the policy, it is clearly stated that:

> " ……..expressed to be payable on satisfactory proof having been received and accepted by the Directors of the Underwriter of the happening of the event upon which the said benefits are herein expressed to be payable and the title of the claimant or claimants".

Mr *Biti's* contention is that the date that ought to be considered is the 12th of October 2018 when the diagnosis of pneumoconiosis was made. However, this is not supported by the evidence. There is no evidence by the applicant that his salary ceased in October 2018. The applicant's employment was terminated on the 25th of April 2019 which became the date that triggered the request for payment. The calculation of US$22 944 actually incorporates the period from October 2018 to April 2019. Whether the termination was lawful or unlawful is neither here nor there and in any event is not an issue before this court.

What then was the law applicable on the 25th of April 2019 in relation to currency? This issue was put beyond doubt in *Zambezi Gas Zimbabwe (Pvt) Ltd vs N.R Barber (Pvt) Ltd and Anor,* SC-3-20 where it was held as follows:

> "The appeal succeeds. The Court holds that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) ("S.I. 33/19") expressly provides that assets and liabilities, including judgment debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one-to-one rate.*"*

Further that:

> "The issue of the time-frame within which the liability arose in relation to the effective date of 22 February 2019 does not matter. What is of importance is the fact that the liability should have been valued before the effective date in United States dollars and was still so valued and expressed. The judgment debt was ordered against the appellant on 25 June 2018. It was valued and expressed in United States doll*ars* and was still so valued and expressed immediately before 22 February 2019."

In *casu,* it is not in contention that the subscriptions were paid in US$ before the 22nd of February 2019 and were therefore covered by S.I. 33/19 as incorporated into the Finance Act no. 2 of 2019.

Further, that:

> "The effect of the phrase "on and after" is that the conversion of the values of "all assets and liabilities" which were valued and expressed in United States dollars immediately before the effective date to values in RTGS dollars at a rate of one United States dollar to one RTGS dollar would apply at the time the value of the asset or liability is liquidated or discharged. Assets and liabilities covered by s 4(1) (d) of S.I. 33/19 are of a sui generis nature. They accrue immediately before the effective date and continue to exist after the effective date."

This means that it is the time that the liability accrues that is important. To that end the court fully agrees by the submissions made by Mr *Mahere* and Mr *Peneti* that the first and second respondents are not liable to pay the applicant the sum of US$22 944 as claimed because of the law in existence at the time the need to pay arose. Mr *Biti argued* that the second respondent was negligent in submitting the claim late with the first respondent. Apart from not properly pleading the necessary averments to found a cause of action of negligence, as outlined above what matters is the date when the liability accrued, in *casu*, the 25th of April 2019.

It is trite that the court does not make pleadings for litigants. In the draft order, the applicant seeks in the main, payment of the equivalent of US$22 944 as an alternative, calculated at the rate prevailing as at the date of payment. This does not even take into

account that RTGS22 944 has been paid already. The rate prevailing at the date of payment is known and there is no reason why the applicant should not have sought the actual amount outstanding.

Although the applicant sought to make a constitutional argument on the basis that s 22 (1) (d) of the Finance Act no. 2 of 2019 is unconstitutional, (in the draft order the applicant seeks that s 23 of the Finance Act no. 2 should be declared unconstitutional thus bringing more confusion) the Supreme Court has pronounced that litigants should desist from coming up with constitutional arguments as a by-the way issue. The litigant ought to lay out fully the constitutional argument and not bring it in as a mix of other issues. See *CABS* v *Stone and Ors,* SC-15-21. In any event as stated, constitutional relief should not be sought as alternative relief.

Having found that the first and second respondents are not liable to pay US$22 944 to the applicant, it will not be necessary to determine the issue of indemnity in relation to the third respondent. On the basis of the *CABS* judgment (*supra),* the court declines to entertain the constitutional issue raised by the applicant.

Costs are at the discretion of the court. The application was clearly ill-conceived and costs should follow the event.

DISPOSITION

1. The application be and is hereby dismissed.
2. The applicant shall pay costs.

Tendai Biti Law, applicant's legal practitioners
Gill, Godlonton and Gerrans, first respondent's legal practitioners
Dube, Manikai and Hwacha, second respondent's legal practitioners
Civil Division of the Attorney-General's office, third respondent's legal practitioners